Supreme Court, U.S.
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FOR ARGUMENT

In The

Supreme Court of the United States

October Term, 1979

No. 79-105

CURTISS-WRIGHT CORPORATION,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

In the Brief for Petitioner, Curtiss-Wright set forth its position as to the questions presented for review on which the petition for the writ of certiorari was granted. In the Brief for Respondent, GE often makes arguments which are of little, if any, relevance to the questions presented, and when it does discuss these questions, GE misstates Curtiss-Wright's position on key points. Curtiss-Wright submits this Reply Brief to assist the Court in placing GE's arguments in proper perspective.

POINT I

THE ISSUES BEFORE THE COURT RELATE TO THE BARRIER WHICH THE THIRD CIRCUIT HAS ERECTED TO RULE 54(b) CERTIFICATION IN THE PRESENCE OF A COUNTERCLAIM, AND THE COURT SHOULD NOT BE DIVERTED BY THE EXTRANEOUS ISSUES SOUGHT TO BE RAISED BY GE.

In the Brief for Petitioner (hereinafter "CW Brief"), Curtiss-Wright focused on the key issue before this Court, namely, whether the mere possibility of a setoff raised by GE's unadjudicated and unliquidated counterclaim deprived the district court of discretion to enter final judgments on Curtiss-Wright's adjudicated and liquidated claims for final payment, totaling nearly $19 million, for goods sold and delivered when those claims were factually and legally unrelated to the counterclaim and the balance of the claims in the complaint. GE's responding brief (hereinafter "GE Brief") is, for the most part, an attempt to distract this Court from that issue although it is indeed the issue upon which the Third Circuit's decision turns.

GE never acknowledges that the possibility of a setoff posed by the counterclaim was the true basis upon which the Third Circuit concluded that the district court had abused its discretion and that it was this mere possibility that triggered the Third Circuit's establishment of its confused and prohibitive standard of "unusual or harsh circumstances." In fact, GE misstates the holding of the court of appeals when it asserts that the appellate court found two independent grounds for its decision, *i.e.*, (1) the absence of "unusual or harsh circumstances" such as ones "involving solvency, economic duress, etc." and (2) the pending counterclaims (GE Brief at 7-8). In fact, the Third Circuit held that a showing of "unusual or harsh circumstances" was required *because* of the pending counterclaim. There is nothing in the opinion below indicating

that the Third Circuit would require a showing of "unusual or harsh circumstances," as it attempted to define that term, in the absence of the counterclaim.[1]

In fact, only one day after the filing of its opinion in this case, the Third Circuit unanimously affirmed a Rule 54(b) certification of a money judgment when no counterclaim was pending. *See Tilden Financial Corp. v. Palo Tire Serv., Inc.*, 596 F.2d 604 (3rd Cir. 1979). Nowhere in *Tilden* did the court mention "unusual or harsh circumstances" nor can any be ascertained from a reading of the opinion. It is more than of some interest to note that Judge Garth, who wrote the majority opinion in *Allis-Chalmers Corp. v. Philadelphia Electric Company*, 521 F.2d 360 (3rd Cir. 1975), participated in the *Tilden* decision. Interestingly, both Judge Garth and Judge Hunter, who also participated in *Tilden*, did not participate in Curtiss-Wright's petition for rehearing in the present case.

Instead of addressing the counterclaim issue, GE launches into a virtually irrelevant discussion of the policy against piecemeal appeals. *See* Point III, *infra*, at 15-18. Not content with raising this smoke screen, GE improperly argues (1) the merits of the "release issue," (GE Brief at 39 n.18), decided by the district court in Curtiss-Wright's favor, an issue which the Third Circuit did not address and which is not before this Court, and (2) that Curtiss-Wright has somehow been delinquent in bringing its claims (GE Brief at 3, 20-21), a non-issue which has never been

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1. In the case at bar, the court of appeals purported to merely rely upon its dictum in *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 366 (3d Cir. 1975):

> "In the absence of unusual or harsh circumstances, we believe that the presence of a counterclaim, which could result in a set-off against any amounts due and owing to the plaintiff, weighs heavily against the grant of 54(b) certification."

Curtiss-Wright Corp. v. General Electric Co., 597 F.2d 35, 36 (3d Cir. 1979) (221a).

determined by the district court or the court of appeals and obviously is not before this Court.

Even if the release issue were before this Court, GE's argument on the release issue is patently self-serving. GE cites to New York cases, but fails to mention that the district court based its decision on the most recent New York case which was affirmed by the highest court of the State of New York (164a-172a).[2]

GE's attempt to argue the release issue before this Court is at best injudicious, especially in view of Judge Rosenn's dissent below wherein he concluded that the district court had correctly decided the release issue in Curtiss-Wright's favor. 597 F.2d at 40 (223a, 232a).[3] In addition, documents produced in the litigation to date during discovery reveal that GE's own personnel were concerned over the improper use being made of the release clause as being applied to Curtiss-Wright. They acknowledged that the clause was being used as a "lever" to force Curtiss-Wright to withdraw its other claims against GE. The following are relevant extracts from these documents:

(1) Letter of Phelps (General Electric) to Cardinali (Navy) dated July 14, 1976:

"...The basic issue still remains as to whether [Curtiss-Wright] can pursue identified claims and receive payment of their withholding. This possibility has been denied based on a reading of Navy terms and conditions 604-5, Article 5,

2. *Tufano Contracting Corp. v. Port of New York Authority*, 33 Misc. 2d 1028, 227 N.Y.S. 2d 707 (Sup. Ct. 1962), *aff'd*, 18 App. Div. 2d 832, 237 N.Y.S. 2d 562, *aff'd*, 13 N.Y. 2d 967, 194 N.E. 2d 603, 244 N.Y.S. 2d 643 (1963).

3. Judges Seitz and Aldisert, concluding that the appellate court was without jurisdiction, did not discuss the merits of the issue.

Payments, which requires a release as a condition precedent to final payment. . . . MAO [General Electric] on two occasions . . . has formally recommended acceptance of some form of conditional acknowledgment. This was based on the continuing likelihood that the clause in Article 5 as was being enforced could be found to be unconscionable or otherwise unenforceable. . . ."

(2) Memorandum of Balicki (General Electric) to Phelps (General Electric) dated June 22, 1976:

"With the advent of the (Curtiss-Wright) civil action, MAO (General Electric), for the first time in my recollection, is faced with withholding monies in the face of a substantial claim. This civil action brings to light a dimension to withholding heretofore not recognized by most MAO people: i.e., use of withholding monies to either prevent claims or cause the Seller, due to the amount of the withholding, to capitulate his claims position and grant a release to the Prime [Contractor]."

* * *

"[I]t is my judgment that ANSTR [Navy] is withholding monies to lever/prevent/dismiss vendor claims."

(3) Memorandum of Roberts (General Electric) to Balicki (General Electric) dated June 18, 1976:

"There is nothing wrong with contracting parties agreeing to a withholding clause provided that its purpose is mutually understood and is a

> reasonable amount that prudent businessmen could accept. I can accept the principle of precipitating timely redetermination or insurance of performance; however, I cannot agree in any way that it is a built in club to preclude a legitimate claim or force the withdrawal of a claim submitted."[4]

Parenthetically it should be noted that these documents *and* the Navy letter which GE cites (GE Brief at 5-6 n.2)[5] are devoid of any mention of setoffs, grounds for counterclaims against Curtiss-Wright or any basis for non-payment other than the release clause.

GE's assertion that Curtiss-Wright has somehow been delinquent in filing its claims is yet another attempt to color the issue before this Court with irrelevant argument. In any event, the assertion has no basis in fact. As to Curtiss-Wright's claims for final payment, the first claims became due in November of 1975 (186a). Curtiss-Wright amended its complaint to recover these monies only one year later, in November of 1976 (78a) after attempts at negotiations proved unfruitful (88a, 91a). After Curtiss-Wright completed the remainder of the subcontracts, it expeditiously again supplemented its complaint to include claims for the amounts due (208a). It is thus obvious that there was no delay on the part of Curtiss-Wright in seeking its final payments under the 21 subcontracts.

As to Curtiss-Wright's remaining claims in suit, obviously Curtiss-Wright could not bring an action based on

4. These documents were before the district court on the motion for summary judgment and are reproduced in their entirety in the Court of Appeals Appendix at 151-153, 165-167 and 145-148, respectively.

5. GE's bald-faced insertion of the "Navy" letter is indicative of the manner in which GE makes its argument: (1) the entire subject matter is irrelevant to this appeal; and (2) the whole picture is not given, *i.e.*, GE's own position is omitted.

misrepresentations until it became aware, years later, that the representations were, in fact, false. Before filing suit, Curtiss-Wright attempted to avoid litigation by filing a request for extraordinary relief with the United States Navy under Public Law 85-804, 50 U.S.C. §1491. Only after it became obvious that the Navy was not going to act on Curtiss-Wright's request for relief did Curtiss-Wright institute suit against General Electric. With the litigation now nearing the end of its fourth year, GE has yet to file a motion based on the statute of limitations or laches.

The above points are made to dispose of any possible misunderstanding that GE's allegations as to the merits of the release issue or the timeliness of Curtiss-Wright's claims may be relevant to the issues before this Court. Having so stated, we can now turn to the issues which *are* before the Court.

POINT II

GE HAS ATTEMPTED TO AVOID THE ISSUE RAISED BY THE THIRD CIRCUIT'S DECISION BELOW AND PROFFERS NO VALID REASON WHY ITS PENDING UNADJUDICATED COUNTERCLAIMS SHOULD BAR .THE ENTRY OF FINAL JUDGMENT UNDER RULE 54(b) ON CURTISS-WRIGHT'S ADJUDICATED CLAIMS WHICH ARE FACTUALLY AND LEGALLY UNRELATED TO THE COUNTERCLAIMS.

Let us not lose sight of the fact that the Third Circuit's holding below was based upon its erroneous reasoning that the mere possibility of a setoff posed by GE's unadjudicated counterclaim in effect prohibited the district court from entering final judgments under 54(b) on Curtiss-Wright's adjudicated and liquidated claims totalling nearly $19,000,000. For the reasons set forth in the CW Brief, Curtiss-Wright maintains that the Third Circuit has, for all practical purposes, erected the pending counterclaim as a barrier to the entry of final judgment on

adjudicated claims totally unrelated to the counterclaim. This result is (1) contrary to the plain language of Rule 54(b), (2) contrary to precedent, and (3) inimical to sound judicial administration. *See* CW Brief at 20-34.

In its answering brief, GE not only misstates the holding of the Third Circuit,[6] but additionally attempts to obfuscate the issue by deliberately misconstruing Curtiss-Wright's position on the consideration to be given an unadjudicated counterclaim in the Rule 54(b) determination process. GE also engages in a strained and an essentially irrelevant discussion of "piecemeal appeals"[7] in a further attempt to divert the Court's attention from the obvious fact that but for the Third Circuit's concern about a possible setoff,[8] it would not have held that the district judge abused his discretion under Rule 54(b) in this case.

It is *not* Curtiss-Wright's position that the district judge below need not have considered the unadjudicated counterclaim in his determination to enter final judgment on Curtiss-Wright's claims for final payment.[9] As discussed in *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956) (hereinafter "*Sears*") and *Cold*

6. *See* Point I, *supra*, at 2.

7. GE's misinterpretation of the policy against piecemeal appeals in its application to this case is discussed in Point III, *infra*, at 15-18.

8. The Third Circuit below held:

> "[O]f decisive significance, it is tacitly conceded that the only harsh circumstance presented here is Curtiss's inability to use the money from the judgment. The result is indeed harsh from Curtiss's viewpoint, but what if GE prevails on its compulsory counterclaim? How is its loss resulting from the deprivation of the money to be restored?" 597 F.2d at 36.

9. GE erroneously attributes a contrary position to Curtiss-Wright. *See* GE Brief at 11, 34.

Metal Process Co. v. United Engineering & Foundry Co., 351 U.S. 445 (1956) (hereinafter "*Cold Metal*"), before entering a final judgment on a single claim in a multiple claims case, the district judge must analyze the underlying facts and legal issues presented by the unadjudicated claim, including any unadjudicated counterclaims. If the adjudicated and unadjudicated claims can be decided independently of one another so that an immediate appeal of the former will neither be premature nor disruptive of the proper adjudication of the latter, the district judge is then free to enter a final judgment under the rule when, in his discretion, justice so requires.[10]

Curtiss-Wright does not quarrel with the premise that the counterclaim must be carefully considered by the district judge. It is the manner of such consideration that caused the Third Circuit to fall into error. Under Rule 54(b), even a compulsory counterclaim is to be considered in the same manner as any other unadjudicated claim, not as some sort of special barrier to 54(b) certification. This is the clear holding of *Cold Metal*. 351 U.S. at 452. As Professor Moore has noted:

> "[I]t is immaterial whether the counterclaim is compulsory or permissive, except as the *relationship* of the counterclaim to the claim bears upon the district court's *discretion* in making the [Rule 54(b)] certificate."[11]

10. *See Bendix Aviation Corp. v. Glass*, 195 F.2d 267, 272 (3d Cir. 1952) *(en banc)* (hereinafter "*Bendix*"). The Third Circuit in raising the jurisdictional question on its own motion in *Allis-Chalmers*, apparently overlooked *Bendix* which is cited with approval in *Cold Metal*, 351 U.S. at 452, and instead cited to *Panichella v. Pennsylvania Railroad Co.*, 252 F.2d 452 (3d Cir. 1958). As will be discussed in Point IV, *infra*, at 20-21 the court's reliance on *Panichella*, a case involving claims unquestionably interrelated in law and fact, was misplaced.

11. 6 *Moore's Federal Practice*, ¶ 54.35[1] at 584 (2d ed. 1976) (emphasis added).

In the present case, the district judge carefully made the analysis required by *Sears* and *Cold Metal* and determined that the adjudicated and unadjudicated claims were sufficiently independent, factually and legally, to warrant the exercise of his discretion under the rule (197a-198a).[12] In addition, the district judge found that a failure to enter final judgments on Curtiss-Wright's claims for final payment for goods sold and delivered would work a substantial injustice. The Court noted that it might take years to resolve the remaining unadjudicated claims in suit and for that period of time Curtiss-Wright would lose the benefits of its judgment, as exemplified by the disparity between the legally mandated prejudgment interest rate of 6 percent simple interest per year and modern day interest rates.[13] Curtiss-Wright maintains that in light of the district court's undisputed finding that Curtiss-Wright's adjudicated claims can be properly decided independently of GE's counterclaims, and all other claims in suit, the Third Circuit misconstrued Rule 54(b) in holding that the possibility of a setoff was a barrier to the entry of final judgment on Curtiss-Wright's adjudicated claims, the amounts of which are not in dispute.

Like the Third Circuit, GE never articulates a sound reason why a mere potential setoff constitutes "a just reason for delay" under Rule 54(b). To the contrary, there is a possibility that the setoff will not materialize or that Curtiss-Wright will recover on its remaining claims in suit in an amount exceeding a recovery on the counterclaims, if any.[14] If the setoff does not materialize,

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12. The court of appeals did not question this portion of the district court's opinion. Nor did GE contest this determination by the district court in the court of appeals.

13. For a more comprehensive discussion of factors which overwhelmingly support the district court's entry of final judgment in this case, *see* Point V, *infra*, at 24-27.

14. *See* Judge Gibbons' dissenting opinion sur denial of the petition for rehearing. 599 F.2d at 1263 (257a).

then Curtiss-Wright will never be able to recover the economic loss suffered by the delay in payment.[15]

As we have noted (CW Brief at 26-27), outside the Third Circuit, the courts in appropriate cases have not hesitated to enter final money judgments on adjudicated claims despite pending counterclaims, and Rule 62(h) is available to address the Third Circuit's concerns as to "who should hold the money." If the framers of the rules had intended the factors relating to enforcement to be considered under Rule 54(b) as well as Rule 62(h), it seems unlikely that the original Rule 54(b) would have been amended to move the enforcement provisions to Rule 62(h). Even if GE were correct that some Rule 62(h) factors can also be considered under Rule 54(b) (GE Brief at 40), an abuse of discretion can hardly be found if the district court has chosen the obvious path rather than the obscure one.

GE never comes to grips with the counterclaim issue. Instead, in attempting to avoid the issue GE has painted itself into a corner by taking the ludicrous position that *even if no counterclaims were pending* Curtiss-Wright would nevertheless be required to meet some ill-defined standard of "hardship" in order to obtain a final judgment on its adjudicated claims while its unadjudicated claims are pending. This position finds support neither in logic nor in precedent, even in the Third Circuit.[16] It

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15. On the other hand, GE, as a "cost plus" prime contractor of the Government (272a), has been reimbursed by the Government for its "out-of-pocket" losses and will retain this money whether or not it prevails on its counterclaims. It will also be reimbursed for the final payments to Curtiss-Wright and receive its fixed fee thereon.

16. *See Tilden Financial Corp. v. Palo Tire Serv., Inc.*, 596 F.2d 604 (3rd Cir. 1979), *discussed in* Point I, *supra*, at 3. Other circuits have taken appeals under Rule 54(b) in cases where no counterclaim was pending without noting any special harsh circumstances or "irreparable injury." *See, e.g., Selk v. St. Paul Ammonia Products, Inc.*, 597 F.2d 635, 636 (8th Cir. 1979); *Jones v. Menard*, 559 F.2d 1282, 1284 n.1 (5th Cir. 1977); *Monarch Asphalt Sales Co. v. Wilshire Oil Co. of Texas*, 511 F.2d 1073, 1077 (10th Cir. 1975); *Bushie v. Stenocord Corp.*, 460 F.2d 116, 118 n.2 (9th Cir. 1972).

defies common sense to suggest that a party should be deprived of the benefits of its judgment simply because it has other unrelated claims against the same defendant. In addition, it is manifest that GE's "hardship" requirement, tantamount to "irreprarable injury" (*see* Point III, *infra*), in cases where no counterclaims are pending would be avoided by litigants with little difficulty.[17]

Near the end of its brief (GE Brief at 34), GE finally attempts to address the erroneous reasoning of the Third Circuit in this case, but can cite no valid precedent in support of the Third Circuit's position that a counterclaim, posing the possibility of a setoff, is in and of itself, a barrier to the entry of final judgment on factually and legally unrelated claims.[18] For example, in *Gaetano Marzotto & Figli, S.P.A. v. G. A. Vedovi & Co.*, 28 F.R.D. 320, 324 (S.D.N.Y. 1961) (cited in GE Brief at 34) the court declined to enter final judgment on plaintiff's adjudicated claims. But the court nowhere based its determination on a possibility of a setoff posed by the counterclaims. Rather, the court undertook the analysis required by *Sears* and *Cold Metal* and determined that it could not satisfy itself that plaintiff's claims and the counterclaims were not "so closely related to be inherently inseparable." To the same effect is *Bethlehem Steel Corp. v. Tishman Realty & Construction Co.*, 72 F.R.D. 33, 34, 40 (S.D.N.Y. 1976) (cited in GE Brief at 34) where the court also noted that even a compulsory counterclaim was not an absolute bar to the entry of summary judgment for the price of goods sold and delivered.[19]

17. Courts could anticipate all types of maneuvers to avoid joining claims, such as actions brought at different times or in different jurisdictions. In the end, such a result would frustrate judicial economy rather than promote it.

18. Though GE refers to its counterclaim as "substantial" and notes that it survived a motion to dismiss, it should be noted that the motion was premised on GE's alleged "failure to state a claim" and was based only on the pleadings themselves (173a-174a). Thus, the substantive merits of GE's counterclaim have never been ruled upon by the district court.

19. *TPO Incorporated v. Federal Deposit Insurance Corp.*, 487 F.2d 131 (3rd Cir. 1973), also cited by GE (GE Brief at 33), does little to support GE's position, as discussed in CW Brief at 22 n. 21.

GE also cites Professors Wright and Miller as taking the position that it is undesirable to award a judgment that may have to be returned. This is an erroneous citation. What GE has referred to is merely Wright and Miller's notation, based on the dictum in *Schroeter v. Ralph Wilson Plastics, Inc.*, 49 F.R.D. 323 (S.D.N.Y. 1964), to the effect that "presumably" it is undesirable to award an amount which may have to be returned. 10 Wright & Miller, *Federal Practice & Procedure*, §2659 at 82 and n. 72 (1973). GE, however, conveniently leaves out the word "presumably" in its paraphrasing of the text. Moreover, the brief comment in *Schroeter* merely states that the counterclaim may have some relevance, but the court clearly did not hold that it was dispositive since it explicitly stated it would consider a Rule 54(b) application in that case although counterclaims were pending. Curiously, in *Allis-Chalmers*, the Third Circuit chose to cite "authority" such as *Schroeter*, while ignoring cases such as *Sears*, *Cold Metal* and *Bendix*.

In the end, GE is reduced to arguing that its counterclaims are "compulsory" (GE Brief at 39), a fact which, as *Cold Metal* makes clear, is of no consequence in the Rule 54(b) determination process.[20] GE's vague statement that the Third Circuit, when it considers the release issue, will be required "to delve in some degree into the relationship of the parties and

20. GE's attempt to limit *Cold Metal* to its facts is unpersuasive. No court has done so, and in appropriate cases courts have entered final judgments under Rule 54(b) in the face of pending counterclaims. *See* CW Brief at 26-27 nn. 25-27, 29. *Cold Metal* itself does not purport to deal with a unique situation; rather *Sears* and *Cold Metal* lay down guidelines for the application of Rule 54(b) which are to be followed in every case. In fact, the Court in *Cold Metal* made it clear that the same considerations governing the district court's discretion under the rule are relevant to cases where counterclaims may be pending. GE's characterization of the counterclaim in *Cold Metal* as "ancillary" is meaningless. The word "ancillary" in *Cold Metal* refers to the jurisdictional basis of the counterclaim and has nothing to do with the factual and legal relationship between the claims which constitutes the basis of the Rule 54(b) determination.

some of the circumstances underlying their broad ranging dispute" (GE Brief at 39) is unsupportable and directly contradicted by the district judge's express determination, unchallenged by the Third Circuit, that the facts and legal issues involved in Curtiss-Wright's adjudicated claims are unrelated to any of the other claims in suit. GE's assertion is nothing more than a last minute attempt to find some relevant connection where none exists between Curtiss-Wright's adjudicated claims for final payment and GE's unadjudicated counterclaim. In the court of appeals, GE never contended that there were any factual or legal issues relevant to any of the remaining claims in suit, including the counterclaim, which had to be resolved before the Third Circuit could properly consider the release issue. GE's statement represents nothing less than a blatant recognition on GE's part of the weakness of the arguments that it has made before this Court.

As we have demonstrated, Rule 54(b) provides that the district court may enter final judgment on less than all of the claims in suit when the adjudicated claims are unrelated to the unadjudicated claims. GE has failed to demonstrate any basis to justify the Third Circuit's establishment of a counterclaim as a virtual *per se* barrier to Rule 54(b) certification in civil damage actions.

POINT III

RULE 54(b)'S "NO JUST REASON FOR DELAY" STANDARD PROVIDES A SOUND BASIS FOR JUDICIAL ADMINISTRATION, AND GE'S CONTENTION THAT RULE 54(b) REQUIRES A SHOWING OF IRREPARABLE INJURY IS PATENTLY CONTRARY TO THE CLEAR LANGUAGE AND THE INTENT OF THE RULE AND REFLECTS GE'S DISTORTED VIEW OF THE POLICY AGAINST PIECEMEAL APPEALS.

It cannot be disputed that the orders certified by the district court under Rule 54(b) in this case constitute the final disposition of an entirely separate and distinct claim for relief. This case does not present an interlocutory appeal of an issue within a single claim.[21]

GE, however, seeks to blur the distinction between an appeal from a final decision disposing of a separate claim in a multiple claims action, as is the case here, and an interlocutory appeal from a non-final order. GE would have this Court arbitrarily apply an "irreparable harm" standard, which is sometimes applied to interlocutory appeals within a single claim, to appeals from *final judgments* entered under Rule 54(b). Such a result is not only unsupported by precedent but is at odds with the goals Rule 54(b) seeks to accomplish. Moreover, GE seeks to invoke the policy against piecemeal appeals in a case where it has no application (GE Brief at 17, 31).

Rule 54(b) obviously envisions that in some cases justice may require more than one appeal where distinctly separate claims are involved. In a case, such as the present one, where the appeal on the adjudicated claims will not adversely affect in any way the dispositior of the remaining claims or lead to duplicative or unnecessary appellate review there is simply no basis to apply the policy against piecemeal appeals.

21. Thus, GE's reliance on cases such as *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), is misplaced. In that case the Court was confronted with a classic interlocutory appeal of an issue within a single claim for relief.

As far as precedent is concerned GE ignores the obvious fact that in neither *Sears* nor *Cold Metal* did the Supreme Court even imply, let alone explicitly adopt a standard of "irreparable injury" restricting the district judge's discretion under the rule. Instead, the Court reasoned that the role of the district judge under the rule should be viewed as one of a "dispatcher" to determine the appropriate time when a separate claim in a multiple claims action is ready for appeal since he is "the one most likely to be familiar with the case and with any justifiable reasons for delay."[22] 351 U.S. at 435, 437. As *Sears* and *Cold Metal* make clear, it is the concept of an independent or separable claim which is at the heart of the district court's discretion under Rule 54(b), adopted specifically in response to the liberal joinder of claims permitted by the Federal Rules of Civil Procedure.[23]

The Supreme Court decisions which GE has elected to call to the Court's attention provide little, if any, guidance in the multiple claims context of Rule 54(b). They are all decisions within the context of appeals or writs of mandamus within a single claim.[24] GE's argument is nothing more than an attempt

22. The Court in *Sears* noted that the timing of the appeal is "vested by the rule *primarily in the discretion of the district court.*" 351 U.S. at 437 (emphasis added). In the present case the Third Circuit has improperly substituted its judgment for that of the district court and has erected a standard of "unusual or harsh circumstances" which actually *divests* the district court of practically all of its discretion.

23. *Sears*, 351 U.S. at 432-433.

24. GE's citation to Justice Frankfurter's opinion in *DiBella v. United States*, 369 U.S. 121 (1962), in this context is misleading (GE Brief at 31). Justice Frankfurter simply noted the "collateral order doctrine" and Rule 54(b) as two instances in his list of exceptions to the final judgment rule. He was not suggesting that Rule 54(b) was governed by the collateral order doctrine's standard of irreparable injury. Rather, as Justice Frankfurter noted, all the exceptions to the policy against piecemeal appeals have at least one factor in common, namely the independence or severability of the issue on appeal from all other issues in the case. 369 U.S. at 126.

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to turn the policy against piecemeal appeals, a policy of practical application, into one of arbitrary dogma that GE would apply even in cases such as the present one, where the appeal on the release issue would in no way adversely affect the disposition of the remaining claims in suit nor cause unnecessary or duplicative appellate review.

Nor is there any merit to GE's contention that the district court's entry of final judgment in this case would open the floodgates to piecemeal appeals or make money judgments appealable as a routine matter. In most multiple claims cases the facts and legal issues involved in the adjudicated and unadjudicated claims will be sufficiently interrelated to make premature an early appeal on the adjudicated claims. It will be the relatively rare instance which presents facts such as are before the Court in this case. Moreover, it is *not* Curtiss-Wright's position that Rule 54(b) requires the district judge to enter a final judgment in every instance where the adjudicated claim is independent of the pending claims. The rule by its very language is discretionary. Rather, the district judge should exercise his discretion to enter final judgment under the rule only when in his view justice so requires under all the circumstances of the case before him. *See United Bank of Pueblo v. Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976). We submit that this is the clear mandate of the rule's "no just reason for delay" language.

It is thus clear that there are no underlying facts presented in this case from which GE can construct a valid argument that the policy against piecemeal appeals has any application here. In addition, GE has articulated no valid reason why a standard of

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In this regard, it should be noted that in *Huckeby v. Frozen Food Express*, 555 F.2d 542 (5th Cir. 1977), cited in GE Brief at 15, the court ruled that appellant could not demonstrate irreparable injury under the collateral order doctrine, but nevertheless remanded the case to the district court to determine whether Rule 54(b) certification should be entered, the implication being that Rule 54(b) is *not* governed by a standard of irreparable injury.

"irreparable injury" should be applied. As will be discussed in Point IV, *infra*, GE's attempt to use the "infrequent harsh case" language found in the Advisory Committee Note to the 1946 Amendment to Rule 54(b) as a makeweight for its "irreparable injury" argument is as unpersuasive as the argument itself.

POINT IV

GE SEEKS TO HAVE THE LANGUAGE OF THE ADVISORY COMMITTEE REPLACE THE LANGUAGE OF THE RULE AND TO GIVE THE ADVISORY COMMITTEE LANGUAGE AN INTERPRETATION SO RESTRICTIVE AS TO RENDER THE RULE ITSELF A NULLITY.

Let us first put the "infrequent harsh case" language of the Advisory Committee Note to the 1946 Amendment to Rule 54(b), 5 F.R.D. 433, 472-73 (hereinafter "Committee Note") in its proper perspective. While it may well be, as one commentator has concluded, that the language was inadvertent,[25] we have noted that the Committee Note is primarily concerned with the problem that existed under original Rule 54(b) as it was enacted in 1937 (CW Brief at 32-33 n.37). Under the original rule it was unclear to many litigants as to when the time for appeal began to run, and because of this confusion many appeals were taken from interlocutory orders disposing of only a portion of the action "although a trial remained to be had on other claims similar or identical with those disposed of." Committee Note, 5 F.R.D. at 472-73. Bearing in mind, therefore, the particular problem for which a solution was sought, the Committee Note's "infrequent harsh case" language most likely simply reflects the Committee's concern that the finality rule not be undermined by the certification of claims so closely related to the unadjudicated claims as to violate the policy against piecemeal appeals. Such an interpretation of the language would of course be entirely consistent with *Sears* and *Cold Medal*, as well as *Bendix*.

25. Note, 54 N.C.L. Rev. 1265, 1272-73 (1976).

Notwithstanding the interpretation one may give to the Committee Note, it is obvious that the meaning of the rule is abundantly clear from the language of the rule itself and the teachings of *Sears* and *Cold Metal*. The Committee Note is now over 30 years old and subsequent to its publication two decisions of the United States Supreme Court have interpreted the 1946 Amendment to the rule. It is a fundamental principle in the construction of any statute or rule that one looks first to the plain language of the rule and to the decisions, in the case of the Federal Rules of the United States Supreme Court.[26] Speculation as to the weight, if any, to be given to the "infrequent harsh case" language in the Note would be of little utility. This language was neither enacted by Congress nor adopted by the Court and should not be interpreted by lower courts in a manner so as to permit them to ignore the plain language of the rule and the decisions of this Court, and to, in effect, write their own rule, which is exactly what the Third Circuit has done in this instance.

GE would have us believe that the Committee Note interprets the rule as one to be utilized only where needed to prevent "irreparable harm." There is absolutely nothing in the language of the rule or *Cold Metal* or *Sears* to lead us to accept that conclusion, nor is there anything to bring us to that conclusion in the Advisory Committee Note to the 1961 Amendment to Rule 54(b),[27] 28 U.S.C.A. Fed. R. Civ. P. 54(b), which states:

26. "[I]n this instance the issue concerns the construction and application of the Federal Rules of Civil Procedure. It is thus appropriate for us [the Supreme Court] to determine on the merits the issues presented and to formulate the necessary guidelines in this area." *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964).

27. In 1961, Rule 54(b) was once again amended to cover multiple parties situations as well as multiple claims situations.

> "This rule permitting appeal, upon the trial court's determination of 'no just reason for delay,' from a judgment upon one or more but fewer than all the claims in an action, has generally been given a sympathetic construction by the courts and its validity is settled. *Reeves v. Beardall*, 316 U.S. 283 (1942); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445 (1956)."

Obviously the Committee in 1961 was not of the view that the Court in *Sears* or *Cold Metal* had misinterpreted the intended meaning of the rule.

In their preoccupation with placing the most onerous construction possible on the rule through the 1946 Committee Note, GE and the Third Circuit completely ignore the fact that the district court in this case followed the rule with utmost care and made an abundance of findings supporting its conclusion that there is "no just reason for delay." It cannot be seriously argued that the district court judge had no basis for said finding nor can it be argued that in this case there exists any "just reason for delay." There simply is not.

The cases cited by GE quoting the "infrequent harsh case" language of the Committee Note (GE Brief at 15) do nothing to support GE's position. In reading the cases cited by GE one cannot help but notice that they all involve appeals from *dismissals* of a claim. Thus the injustice involved in the delay of entry of a final affirmative judgment such as the money judgment in this case, was not a factor in any of the cases cited by GE. The second obvious fact to be noted is that none of those cases adopt GE's proposed standard of "irreparable injury."

Lastly and of utmost significance is the fact that in those cases cited by GE where an appellate court found an abuse of

discretion by the district court under Rule 54(b), the conclusion was reached only after a determination by the appellate court that the adjudicated and unadjudicated claims were so inextricably interwoven that an immediate appeal would be premature because of the possibility of duplicative appellate review or mootness, or that delay of the trial of the unadjudicated claims would be the only result of an appeal. *See, e.g., Brunswick Corp. v. Sheridan*, 582 F.2d 175, 183-85 (2d Cir. 1978); *Panichella v. Pennsylvania Railroad Co.*, 252 F.2d 452 (3d Cir. 1958) cited in GE Brief at 15. Indeed, *Brunswick Corp. v. Sheridan, supra*, makes crystal clear that the determination of whether the district court has abused its discretion turns on the factual and legal relationship between the adjudicated and unadjudicated claims:

> "[W]e can readily dismiss [from discussion] cases where decision on the appealed claim in no way turned on the result of the pending claim, so that on any resolution of the pending claim the court's determination of the appealed issue would stand and did not have to be made in the alternative. . . . The pertinent cases are those involving multiple claims as closely interrelated as those here; there this court has dismissed appeals for abuse of discretion in the 54(b) determination." 582 F.2d at 185.

In view of what has been stated above and, if in the light of *Sears, Cold Metal* and *Bendix* and the 1961 Advisory Committee Note, there remains any necessity whatsoever to attempt to further clarify the 1946 Committee Note, it would be wiser to view it in a manner consistent with the language of the rule and the decisions of the Supreme Court instead of reading it as GE does to, in reality, amend the rule by inserting an unintended "irreparable harm" standard.

Regardless of the Committee Note, the Supreme Court decisions and the language of the rule itself make clear that

certification under Rule 54(b) was intended to solve the problems of complex litigation (such as this case):

Where joinder of multiple claims are involved (such as in this case);

Where a claim exists which has been finally adjudicated and is separate, distinct and independent of all other claims and counterclaims in the lawsuit (such as in this case);

Where certification will not prevent the rest of the case from being prepared for trial and the need for review will not be mooted by any future developments in the district court (such as in this case);

Where the same issue will not arise on appeal more than once (such as in this case);

Where because of the complexity and magnitude of the remaining claims the litigation will be extremely lengthy (such as in this case);

Where the district court has determined that the counterclaim with its mere possibility of setoff is under all of the circumstances not a reason for delay in certification (as in this case);

Where the holder of the unadjudicated claim will be deprived of his property for a lengthy period of time and suffer obvious loss while the unadjudicated claims of both parties are being litigated (such as in this case); and

Where the district court has determined injustice would result from delay and finality of judgment would advance the interest of sound judicial administration and justice to the litigants (such as in this case).

If, in fact, detailed guidelines are needed to establish parameters for the district court's discretion in determining "no just reason for delay," have they not been satisfied, as set forth above, and would not a definition of "infrequent harsh case" consistent with the above, should it be necessary to even have such a definition, be one that would be entirely consistent with the language of the rule and the prior Supreme Court decisions?

No court outside the Third Circuit has applied the rule in the manner in which it has been applied in this case by the appellate court. We have cited numerous cases (CW Brief at 26-27 nn. 25-27, 29) where certification was made on the basis of "no just reason for delay," where no mention was made of harsh circumstances and where there hardly could have been presented "harsh circumstances" which would have been sufficient under the virtually insurmountable barrier which the Third Circuit seeks to set forth as a standard for Rule 54(b) certification.

The Third Circuit decision if sustained by this Court would, to paraphrase the words of Judge Gibbons in his dissent sur the denial of the petition for rehearing below, sharply limit the effective use of Rule 54(b) with resulting harm both to litigants and to the ability of district judges to expedite the disposition of cases. 599 F.2d at 1260 (248a, 249a). We submit that GE's interpretation of Rule 54(b) would, if adopted, completely destroy its utility.

POINT V

GE'S DISCUSSION OF STATUTORY INTEREST RATES IS INAPPROPRIATE TO THE CASE BEFORE THE COURT, AND THE INJUSTICE TO CURTISS-WRIGHT FROM THE DELAY IN ENTRY OF FINAL JUDGMENT IS CLEAR.

GE in making a legalistic argument regarding interest rates seeks by slight of hand to distract attention from the fact that the district court in this case utilized Rule 54(b) exactly as the rule was intended, to render justice to litigants.

GE attempts to construct some sort of argument that the district court has impermissibly prescribed a higher interest rate than that provided by the state legislature by entering final judgments on Curtiss-Wright's claims for final payment (GE Brief at 23). This argument is nothing more than a red herring. The district judge in this case was not pre-empting or seeking to change New York prejudgment interest law as GE contends. The court was simply acknowledging the fact that because the adjudication of the remaining claims may take years to complete, the prejudgment interest rate which is fixed by law at rates considerably lower than modern day rates, *see* CW Brief at 19 & n.17, would be unnaturally and unfairly extended well beyond the time when the judgments were actually entered.[28]

Any court would have acted well within its discretion under Rule 54(b) in certifying a claim where only a few of the facts set forth below existed. In this case the litany of factors favoring certification is overwhelming:

(1) Curtiss-Wright has delivered all of the equipment required by the 21 subcontracts in suit; this equipment has either

28. In this regard it should be noted that Rule 54(b) certification in this case would have at least started the running of postjudgment interest, *see* CW Brief at 12 n.6, which would be 8 percent under N.J. Civ. Prac. Rule 4:42-11(a) thereby saving Curtiss-Wright approximately $380,000 per year.

been put to use by GE and the government or is available for their use; there has been no claim made in this litigation that the equipment delivered is in any way defective. The end result is that a failure to certify permits the purchaser of the equipment, GE, the full benefit of its contracts whereas Curtiss-Wright, although it has been adjudged entitled to the monies representing its claims for final payment under those contracts must forego the benefits of its judgments while the parties continue to press their remaining claims against each other in this extensive and prolonged litigation.

(2) Curtiss-Wright in its claims for final payment seeks only those amounts which GE agreed to pay when it entered into the subcontracts. Some of these final payments have been due and owing since November of 1975.[29]

(3) Not only is GE's counterclaim factually and legally unrelated to Curtiss-Wright's claims for final payments but it seeks to recover only $1.9 million in alleged losses; the remainder of GE's $54,000,000 counterclaim is for unjust enrichment which represents neither alleged losses incurred by either GE or the Government, nor any fund of GE which Curtiss-Wright is improperly holding (264a-282a).[30]

(4) As the district judge noted, Curtiss-Wright will suffer daily financial losses for perhaps years[31] if it is unable to execute

29. In Point I, *supra*, at 4-6 we noted that GE's own personnel have viewed the withholding of the final payments as an attempt to force the withdrawal of Curtiss-Wright's remaining claims.

30. Although GE seeks $54,000,000 in "unjust enrichment," it nevertheless concedes that Curtiss-Wright has lost substantial sums in the performance of the 21 subcontracts. GE Brief at 2.

31. Because the remaining issues in suit are extremely complex, discovery will be lengthy As of the date of this brief, neither a trial date nor a date on which a trial date will be set have been determined.

on its judgments for final payment, as exemplified by the disparity between the legally required prejudgment interest rate and the substantially higher interest rates prevalent in today's marketplace.[32] The district judge might just have easily noted the economic loss to Curtiss-Wright caused by the unusually high and protracted present rates of inflation. Moreover, as Judge Rosenn noted in his dissent the loss of the use of nearly $20.000,000 in the operations of even a large corporation such as Curtiss-Wright is a significant detriment.[33] 597 F.2d at 38 (226a).

(5) The failure to enter final judgment achieves the result of permitting Curtiss-Wright's adversaries to finance the litigation with Curtiss-Wright's money.

(6) If GE has valid reasons why a stay of execution should be entered, they may be presented to the court under Rule 62(h).[34]

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32. GE, apparently adopting the Third Circuit's onerous and ill-defined standard of "unusual or harsh circumstances," contends that Curtiss-Wright has not demonstrated that it is on the brink of insolvency and is therefore not entitled to final judgment on its claims for final payment. GE Brief at 7. We must state that GE has wasted a great deal of time trying to knock down this straw man. For the record, Curtiss-Wright admits that it is solvent. The issue before this Court, however, is whether the district court under all the circumstances abused its discretion when it concluded that there would be a denial of justice from a failure to enter final judgment.

33. GE contends that the substantial amount of the judgments involved in this case cannot be a basis for Rule 54(b) certification because such a result would favor the "wealthy" over the "needy" (GE Brief at 21). The argument is a misstatement of Curtiss-Wright's position. Determinations under Rule 54(b) must be based upon the facts and circumstances presented by the individual case before the court. In other cases, justice may indeed require that a final judgment be entered even when the amount of the judgment involved is less than the substantial amount presented by this case.

34. We have noted (CW Brief at 25-29) that factors relating to the enforcement of judgments such as a possible setoff presented by a pending counterclaim are appropriate for consideration under Rule 62(h). In its brief

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These factors cannot be disposed of by GE's irrelevant argument regarding interest rates. The situation as it presently exists is unjust and requires redress. There is no doubt that under the facts and circumstances presented by this case, the district court in entering its final judgment orders under Rule 54(b) did not abuse its discretion but acted in the interests of justice.

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GE totally mischaracterizes Rule 62(h) (GE Brief at 40). The rule is not one which authorizes stays pending an appeal of adjudicated claims, a stay which would normally be of short duration. Rather, the rule authorizes the district court to stay the enforcement of adjudicated claims pending the disposition of any of the remaining claims in suit.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Brief for Petitioner, the judgment of the Third Circuit Court of Appeals (262a) should be vacated, and the case should be remanded to the court of appeals with a direction to reinstate the orders of final judgments of the district court entered on July 28, 1978 (200a) and August 29, 1978 (214a) respectively.

Respectfully submitted,

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